Supreme Court, U.S.
FILED

No. 031687 MAY 28 2004

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2003

REGINALD WILEY

Petitioner,

v.

CITY OF CHICAGO, and
BRODERICK JONES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604

(312) 427-3200
Attorney for Petitioner

QUESTIONS PRESENTED

1. Should the Court resolve the conflict among the circuits in applying this Court's decision in *Albright v. Oliver,* 510 U.S. 266 (1994) to a police frame-up that results in a criminal prosecution which does not conclude with a conviction?

2. Is the Seventh Circuit's rule that damages in an action under 42 U.S.C. §1983 for a police frame-up end when formal charges are filed consistent with the rule of *Monroe v. Pape,* 365 U.S. 167, 187 (1961), is part of that Section 1983 incorporates the "background of tort liability that makes a man responsible for the natural consequences of his actions?"

3. When an appellant secures reversal of a district court's order dismissing a complaint, may a court of appeals deem "waived" a claim that was raised in the complaint but not challenged in the district court by the defendant nor raised in any way on appeal?

INDEX

OPINIONS BELOW 1
JURISDICTION 1
STATUTE INVOLVED 1
STATEMENT 1
REASONS FOR GRANTING THE WRIT 3
CONCLUSION 9

TABLE OF AUTHORITIES

Albright v. Oliver, 510 U.S. 266 (1994) 2, 3, 5

Buckley v. Fitzsimmons, 509 U.S. 259 (1993) 6

Carey v. Piphus, 435 U.S. 247 (1978) 6

Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003) (en banc) 4, 6

Christman v. Hanrahan, 500 F.2d 65 (7th Cir. 1974) 3

Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) 4, 5

Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998) 4, 5

Gauger v. Hendle, 349 F.3d 354 (7th Cir. 2003) 2, 4

Gerstein v. Pugh, 420 U.S. 103 (1975) 7

Heck v. Humphrey, 512 U.S. 477 (1994) 2

Kalina v. Fletcher, 522 U.S. 118 (1997) 7

Kingsland v. City of Miami, ___ F.3d ___, 2004 WL 1050743 (11th Cir. 2004) 4, 5

Lambert v. Williams, 223 F.3d 257 (4th Cir. 2000) 4, 5

Moran v. Clark, 296 F.d 638 (8th Cir. 2002) (en banc) .. 4, 6

Monroe v. Pape, 365 U.S. 167 (1961) 7

Malley v. Briggs, 475 U.S. 335 (1986) 7

Moran v. Clark, 296 F.d 638 (8th Cir. 2002) (en banc) .. 4, 6

Newsome v. McCabe, 256 F.3d 747 (7th Cir. 2001), *opinion on denial of rehearing*, 260 F.3d 824 (7th Cir. 2001), *opinion following remand*, 319 F.3d 301 (7th Cir. 2003) 3, 6

Nieves v. McSweeney, 241 F.3d 46 (1st Cir. 2001) 4, 5

Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004) 4

Stemley v. City of Florence, 126 F.3d 856 (6th Cir. 1997), *opinion following remand*, 350 F.3d 578 (6th Cir. 2003) .. 4

Wyatt v. Cole, 504 U.S. 158 (1992) 6

Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000) 4

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on March 22, 2002.

OPINIONS BELOW

The decision of the Court of Appeals (App. 1-6) is reported at 361 F.3d 994. The opinions of the district court (App. 9-14, 15-17) are unreported.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. §1254: The judgment of the court of appeals was entered on March 22, 2004. (App. 7.) Rehearing was denied on April 16, 2004. (App. 8.)

STATUTE INVOLVED

This case involves the Fourth Amendment to the Constitution of the United States and 42 U.S.C. §1983.

STATEMENT

Petitioner Reginald Wiley filed an action for money damages under 42 U.S.C. §1983 against respondents, Chicago Police Officer Broderick Jones and the City of Chicago. (App. 18-19.) Petitioner alleged that he had been framed on January 9, 2000 for a narcotics offense by respondent Jones, (App. 18, par. 5), that Jones had thereafter concealed petitioner's innocence of any criminal wrongdoing from the prosecutors, and had thereby caused petitioner to have been "wrongfully prosecuted." (App. 18-19, par. 6.) The prosecution continued until July of 2002, when all charges were dismissed. (App. 19, par. 7.) Petitioner also alleged that the officer's misconduct was possible because of the deliberate indifference by the City of Chicago to the fabrication of evidence by its police officers. (App. 19, par. 8.) Petitioner sought damages for the violation of rights secured by the Fourth and Fourteenth Amendments, as well as damages for the Illinois tort of malicious prosecution. (App. 19, par. 9.)

Respondent City of Chicago moved to dismiss petitioner's complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure.[1] The City did not contest liability for its alleged deliberate indifference, (App. 10), but asserted that petitioner's only federal claim was for false arrest, and argued that this claim was barred by the two year statute of limitations because the claim had accrued when petitioner was arrested. Petitioner argued that respondent's accrual theory was contrary to *Heck v. Humphrey,* 512 U.S. 477 (1994), but the district court accepted respondent's argument, dismissed petitioner's federal claims against both defendants, and declined to exercise jurisdiction over petitioner's state law malicious prosecution claim. (App. 13-14.)

On appeal, the Seventh Circuit rejected the district court's interpretation of *Heck v. Humphrey, supra.* (App. 2-5.) The Court of Appeals held, however, that petitioner could not maintain a federal claim for "wrongful prosecution," (App. 5), and concluded that petitioner's federal claim was limited to one for false arrest. (App. 5.) The Seventh Circuit followed its decision in *Gauger v. Hendle,* 349 F.3d 354, 361 (7th Cir. 2003), to hold that the damages recoverable on a false arrest claim stop when the arrestee is arraigned or formally charged. (App. 6.) The Court of Appeals rejected petitioner's reliance on the "continuing seizure" theory discussed by Justice Ginsburg in her concurring opinion in *Albright v. Oliver,* 510 U.S. 266 (1994) (App. 5), and held that petitioner had waived his federal claim against the City of Chicago because he had "failed to advance it on appeal." (App. 6.) Petitioner pointed out in a timely petition for rehearing that waiver was inappropriate because the district

---

1. Respondent Jones filed an answer to the complaint, denying any wrongdoing.

court expressly noted that "[t]he City does not contest plaintiff's 'policy' allegations." (App. 10.) Rehearing was denied without opinion. (App. 8.)

REASONS FOR GRANTING THE WRIT

-I-

This case provides the Court with an opportunity to resolve the conflict among the circuits in applying this Court's decision in *Albright v. Oliver,* 510 U.S. 266 (1994) to a police frame-up that results in a criminal prosecution which does not conclude with a conviction.

In its decision in this case, the Seventh Circuit applied its rule that, unless there is a conviction that is subsequently overturned, the federal remedy available to the victim of a police frame-up is limited to the damages that were incurred from the time of arrest to the time of formal charge. (App. 6.)

The Seventh Circuit's rationale for this rule is two-fold. First, a police frame-up does not implicate any due process interest unless the frame-up results in a conviction.[2] Second,

---

2. When a frame-up results in a conviction that is subsequently overturned, the Seventh Circuit permits the recovery of full compensatory damages in a Section 1983 action "for denial of a fair trial" under the Due Process Clause of the Fourteenth Amendment. *Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001), *opinion on denial of rehearing,* 260 F.3d 824 (7th Cir. 2001), *opinion following remand,* 319 F.3d 301 (7th Cir. 2003). In the view of the Seventh Cicuit, there cannot be any denial of a fair trial until there is a conviction. *Christman v. Hanrahan,* 500 F.2d 65 (7th Cir. 1974).

while a police frame-up is actionable as a Fourth Amendment violation, damages end when formal charges are filed because "the Fourth Amendment is aimed at deterring unreasonable searches and seizures, not malicious prosecutions." *Gauger v. Hendle,* 349 F.3d 354, 363 (7th Cir. 2003).

The circuits are split on whether a police frame-up should be viewed as an unlawful seizure under the Fourth Amendment or as a Fourteenth Amendment due process violation.[3] The Seventh Circuit stands alone in its limitation on the

---

3. The First, Third, Fourth, Ninth, and Eleventh Circuits view a police frame-up as a Fourth Amendment violation. *Nieves v. McSweeney,* 241 F.3d 46, 54 (1st Cir. 2001); *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3d Cir. 1998); *Lambert v. Williams,* 223 F.3d 257 (4th Cir. 2000); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1127 (9th Cir. 2002); *Kingsland v. City of Miami,* ___ F.3d ___, 2004 WL 1050743, *10 (11th Cir. 2004).

   The Second, Fifth, Sixth, and Eighth Circuit view a police frame-up as a denial of due process. *Zahrey v. Coffey,* 221 F.3d 342 (2d Cir. 2000) *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc); *Stemley v. City of Florence,* 126 F.3d 856, 872 (6th Cir. 1997), *opinion following remand,* 350 F.3d 578 (6th Cir. 2003) (fabrication of evidence, acquittal, due process theory); *Moran v. Clark,* 296 F.d 638, 647 (8th Cir. 2002) (en banc)

   The Tenth Circuit has not chosen between the two theories, concluding in *Pierce v. Gilchrist,* 359 F.3d 1279, 1293 (10th Cir. 2004) that fabricating evidence is actionable either as a "due process/fair trial deprivation" or as Fourth Amendment violation.

damages recoverable in a Section 1983 action for a police frame-up.

-A-

The conflict among the circuits reflects various interpretations of the concurring and dissenting opinions in *Albright v. Oliver,* 510 U.S. 266, 279 (1994). There, the petitioner had been charged with a non-existent offense and brought a Section 1983 action against the police officer who had initiated the criminal proceedings. The petitioner did not raise any Fourth Amendment claim, but asserted only "that the action of respondents infringed his due process right to be free of prosecution without probable cause. He does not claim that Illinois denied him the procedural due process guaranteed by the Fourteenth Amendment." 510 U.S. at 812.

Albright was decided without a majority opinion. In her concurring opinion, Justice Ginsburg endorsed the view that being held to answer criminal charges, being required to appear in court, and being subject to travel restrictions amounts to a seizure under the Fourth Amendment. This "continuing seizure" theory has been adopted without reservation by the Fourth and Ninth Circuits,[4] and is used by the First, Third, and Eleventh Circuits as the framework for deciding whether conditions of pre-trial release constitute a seizure.[5] The "continuing seizure" theory has been

---

4. *Lambert v. Williams,* 223 F.3d 257 (4th Cir. 2000); *Galbraith v. County of Santa Clara,* 307 F.3d 1119, 1127 (9th Cir. 2002).

5. *Nieves v. McSweeney,* 241 F.3d 46, 54 (1st Cir. 2001); *Gallo v. City of Philadelphia,* 161 F.3d 217, 222 (3d Cir. 1998); *Kingsland v. City of Miami,* ___ F.3d ___, 2004 WL 1050743, *10 (11th Cir. 2004).

"repeatedly rejected" by the Seventh Circuit (App. 5), and has likewise been rejected by the Fifth and Eighth Circuits.[6]

In the view of the Seventh Circuit, the concurring opinion of Justices Kennedy and Thomas in *Albright* "constitutes the effective holding of the Court." *Newsome v. McCabe,* 256 F.3d 747, 751 (7th Cir. 2001), *opinion on denial of rehearing,* 260 F.3d 824 (7th Cir. 2001). The Seventh Circuit stands alone in this interpretation of *Albright.* See *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc).

-B-

"[T]he basic purpose of a 1983 damages award should be to compensate persons for injuries caused by the deprivation of constitutional rights." *Carey v. Piphus,* 435 U.S. 247, 254 (1978). The Seventh Circuit's rule limiting the damages recoverable for a police frame-up is contrary to the purpose of Section 1983 to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights and to provide relief to victims if such deterrence fails." *Wyatt v. Cole,* 504 U.S. 158, 161 (1992).

A police frame-up has impact beyond the immediate deprivation of liberty associated with an unlawful arrest. First, an arrest often results in "stigma and trauma." *Buckley v. Fitzsimmons,* 509 U.S. 259, 287 (1993). Neither the stigma nor the trauma ends when formal charges are filed.

Second, a police frame-up infects all post-arrest judicial proceedings. After a police officer has made a warrantless

---

6. *Castellano v. Fragozo,* 352 F.3d 939, 958 (5th Cir. 2003) (en banc). *Moran v. Clark,* 296 F.d 638, 647 (8th Cir. 2002) (en banc)

arrest, the judicial determination of probable cause that must follow a warrantless arrest, *Gerstein v. Pugh,* 420 U.S. 103, 114 (1975), is corrupted by the officer's wrongdoing when the judge makes a determination of probable cause by accepting as true false statements made by the arresting officer.

A police frame-up similarly corrupts the prosecutor's decision to file formal charges and the judge's decision to set bond and to determine conditions of pre-trial release. The effects of a police frame-up continue until the time that case is resolved in favor of the arrestee.

The Seventh Circuit's limitation on the damages that are recoverable because of a police frame-up flies in the face of the "background of tort liability that makes a man responsible for the natural consequences of his actions" *Monroe v. Pape,* 365 U.S. 167, 187 (1961). The filing of criminal charges based on a police frame-up does not break the causal chain. *Malley v. Briggs,* 475 U.S. 335 (1986); *Kalina v. Fletcher,* 522 U.S. 118 (1997).

A victim of a police frame-up should have access to the same federal remedy regardless of the circuit in which the case arises. In accordance with the principles that this Court has consistently applied since *Monroe v. Pape,* 365 U.S. 167, 187 (1961), the damages recoverable for a police frame-up should not arbitrarily end when formal charges are filed, but should include all damages that are the "natural consequence" of the frame-up.

-II-

The Seventh Circuit fashioned out of whole cloth a new rule of appellate procedure when it held that plaintiff had "waived" his claim of municipal liability. (App. 6.)

Petitioner alleged in his complaint that the frame-up was caused by the deliberate indifference of the City of Chicago to the fabrication of evidence by its police officers. Respondent City conceded the sufficiency of petitioner's claim —

the opinion of the district court makes plain that "[t]he City does not contest plaintiff's 'policy' allegations, but says that he has not adequately alleged that he was deprived of a constitutional right." (App. 10.) The City did not change its position on appeal and limited its arguments to supporting the district court's order that plaintiff's frame-up claim was barred by the statute of limitations. Nonetheless, the Seventh Circuit held that petitioner had waived his federal claim against the City of Chicago because he had "failed to advance it on appeal." (App. 6.) This waiver rule is a vast departure from accepted and ordinary appellate procedure and should be corrected by this Court.

CONCLUSION

It is therefore respectfully submitted that the petition for writ of certiorari should be granted.

May, 2004

KENNETH N. FLAXMAN
200 South Michigan Avenue
Suite 1240
Chicago, Illinois 60604
Attorney for Petitioner

APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY

Plaintiff-Appellant,

v.

CITY OF CHICAGO, and
BRODERICK JONES,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 02 CV 6076 —**Paul E. Plunkett** *Judge.*

Argued November 12, 2003—Decided March 22, 2004

Before BAUER, MANION, and ROVNER, Circuit Judges.

MANION, Circuit Judge. Reginald Wiley alleges that for several years Chicago police officer Broderick Jones has been framing innocent citizens and arresting them without cause. According to Wiley, Jones's routine in each case is the same: he and his partner approach a suspected drug dealer; if a search fails to reveal any incriminating evidence, they plant drugs on him and profess that he was engaged in illegal activity. Wiley claims that in January 2000 he was the victim of one of Jones's frame-ups. He was arrested and prosecuted for possession of narcotics, though the charge was eventually dismissed in July 2002. One month later Wiley sued Jones and the City of Chicago under 42 U.S.C. §1983

for "wrongful prosecution," alleging that Jones fabricated evidence in order to arrest him and thereafter misrepresented his guilt to prosecutors. Wiley further alleged that Jones was able to accomplish his misdeeds by virtue of the City's deliberate indifference to its officers' conduct.

The district court dismissed Wiley's suit for failure to state a claim. Fed. R. Civ. P. 12(b)(6). The court understood Wiley to be asserting that he was prosecuted without probable cause, a cause of action under ' 1983 that we rejected in *Newsome v. McCabe,* 256 F.3d 747, 750-51 (7th Cir. 2001). The court allowed that even if Wiley did not have a claim in federal court for wrongful or malicious prosecution, the alleged conduct might still be actionable if it violated a substantive constitutional right, like the due process right to a fair trial. But despite Wiley's contention that his fair trial rights had been violated, the court concluded that Wiley did not have any such claim. Wiley moved to amend the judgment, Fed. R. Civ. P. 59(e), arguing that the court had overlooked his Fourth Amendment claim against Jones. The district court construed Wiley's Fourth Amendment claim as one for false arrest and denied the motion. Citing *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir. 2001), the court held that any Fourth Amendment cause of action against Jones began to accrue at the time of arrest and so Wiley's claim—filed more than two years after his arrest—was untimely, *Gonzales v. Entress,* 133 F.3d 551, 554 (7th Cir. 1998) (statute of limitations on civil rights action is two years in Illinois).

On appeal both parties agree that if Jones arrested Wiley on the basis of planted "evidence," Wiley would have a Fourth Amendment claim for false arrest. What the parties dispute is when Wiley's claim began to accrue. Wiley argues that the two-year statute of limitations did not begin to run until the charges against him were dismissed; the defendants maintain that his claim began to accrue at the time of the arrest and must now be barred as untimely.

We begin with first principles and therefore start our discussion with *Heck v. Humphrey,* 512 U.S. 477 (1994). *Heck* bars any suit for damages premised on a violation of civil rights if the basis for the suit is inconsistent with or would undermine the constitutionality of a conviction or sentence. Id. at 486-87. Should success in a civil suit necessarily imply the invalidity of a conviction or sentence, Heck requires the potential plaintiff to wait until his conviction is nullified before bringing suit. Id. This rule applies not only to convicted persons but also to plaintiffs like Wiley who as yet only face prosecution. *Gonzales,* 133 F.3d at 553. "If success on the [defendant's] claims would have necessarily implied the invalidity of a potential conviction on the . . . charge, then [defendant's] claims did not accrue until the day on which the . . . charge was dismissed." *Washington v. Summerville,* 127 F.3d 552, 556 (7th Cir. 1997). So if a prisoner or an individual facing prosecution seeks damages using §1983 for an alleged violation of his civil rights, a district court must first determine whether "a judgment in favor of the plaintiff would necessarily imply the invalidity" of the plaintiff's actual or potential conviction. *Heck,* 512 U.S. at 487. If it would, then the suit is barred and the complaint must be dismissed. Id.

Following *Heck,* this court has often held that civil rights claims of false or wrongful arrest arising out of the Fourth Amendment begin to accrue at the time of arrest regardless of subsequent proceedings. *See, e.g., Copus v. City of Edgerton,* 151 F.3d 646, 648-49 (7th Cir. 1998); *Booker v. Ward,* 94 F.3d 1052, 1056 (7th Cir. 1996); *Simpson v. Rowan,* 73 F.3d 134, 136 (7th Cir. 1995). The rationale behind this approach is that a wrongful arrest claim does not necessarily undermine a conviction; "one can have a successful wrongful arrest claim and still have a perfectly valid conviction." *Booker,* 94 F.3d at 1056; *see also Gonzales,* 133 F.3d at 553; *Washington,* 127 F.3d at 556. Therefore, generally speaking, claims for wrongful arrest may be brought immediately

because "the injury of being detained illegally is compensable regardless of whether the plaintiff is later convicted or even prosecuted." *Snodderly*, 239 F.3d at 897.

But this general approach must not be understood as a rule to be applied in every case. The defendants urge us to view our cases such as Booker, Washington, and Gonzales as creating an invariable rule that false arrest claims under the Fourth Amendment accrue at the time of arrest. Such may be the case most of the time, but not always. For while we recognize that discussion in our earlier decisions may have implied such a rule, see *Gauger v. Hendle*, 349 F.3d 354, 361 (7th Cir. 2003), the accrual of the civil rights claims brought in this and other cases is ultimately governed by the Supreme Court's decision in *Heck*. And as we recently explained in *Gauger*, because "sometimes a successful challenge to a false arrest can indeed impugn the validity of the plaintiff's conviction," *Heck* may in fact occasionally bar a civil rights claim premised on a false or wrongful arrest. Id. As a result, plaintiffs complaining of false arrest will sometimes have to wait until their criminal charge or conviction is set aside or dismissed before they can bring suit. *See id.*

This may be one of those times. If, as alleged, Wiley was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of a prosecution premised on the planted drugs. *See id.* at 362. Therefore, any civil suit against Officer Jones for a false arrest would necessarily imply the invalidity of a potential conviction, and Heck requires that Wiley's Fourth Amendment claim would not begin to accrue until the charges were dismissed. *See Heck*, 512 U.S. at 489-90; *Washington*, 127 F.3d at 556. Of course had Wiley been prosecuted on evidence (other than the planted drugs) that would not be invalidated if he successfully challenged his arrest, then Wiley's false arrest claim would not be barred by Heck and would be untimely. *See Gonzales*, 133 F.3d at 553-54. Because at this stage in the

proceedings we accept Wiley's allegations as true, see *McCullah v. Gadert*, 344 F.3d 655, 657 (7th Cir. 2003), we remand this case with instructions to reinstate Wiley's Fourth Amendment claim against Jones for false arrest.

The conclusion we reach here is supported by our recent decision in Gauger. Gary Gauger had been convicted of murder based on statements he made to detectives during an 18-hour interrogation. *Gauger*, 349 F.3d at 356-57. His conviction was overturned on grounds that his statements were inadmissable because the officers lacked probable cause to arrest him in the first place. Id. at 357. Although more than two years had passed from the time of his unlawful arrest until the filing of his §1983 complaint, we deemed Gauger's claim timely. Id. at 362. For Gauger to attack his arrest, we reasoned, "was implicitly to challenge the legality of his conviction, which rested crucially on the statements that he made to the police when he was questioned after being arrested." Id. at 361. Therefore, because Heck barred him from challenging his arrest until he had his conviction overturned, his false arrest claim did not begin to accrue until he had done so. Id. at 361-62. Similarly here, if Wiley's attack on his arrest would challenge the only evidence supporting a potential conviction, then his claim did not begin to accrue until the charges were dismissed in July 2002. *See id.*

For guidance on remand, we also consider the scope of Wiley's claim. Wiley contends that his Fourth Amendment claim encompasses not only the false arrest but also his subsequent "wrongful prosecution," which Jones allegedly initiated and extended by lying to prosecutors. Wiley argues that we should consider him to have been wrongfully detained under the "continuing seizure" approach set forth by Justice Ginsburg, who suggested that a defendant ought to be considered "seized" under the Fourth Amendment "so long as he is bound to appear in court and answer the state's charges." *Albright v. Oliver*, 510 U.S. 266, 279 (1994) (Ginsburg, J., concurring).

But we have repeatedly rejected the "continuing seizure" approach. *McCullah,* 344 F.3d at 661; *Lee v. City of Chicago,* 330 F.3d 456, 463 (7th Cir. 2003); *Reed v. City of Chicago,* 77 F.3d 1049, 1052 n.3 (7th Cir. 1996); *Wilkins v. May,* 872 F.2d 190, 194 (7th Cir. 1989). Instead, we have held that the scope of a Fourth Amendment claim is limited up until the point of arraignment; "the interest in not being prosecuted groundlessly is not an interest that the Fourth Amendment protects." *Gauger,* 349 F.3d at 362-63. Once arraigned, the prosecution is underway. If that prosecution is at some point deemed malicious, then it "is not a constitutional tort unless the state provides no remedy for malicious prosecution." *Id.* at 359. But at oral argument Wiley's counsel insisted that his case was not one for malicious prosecution.

One final matter remains. Although Wiley alleged in his complaint that the City of Chicago was deliberately indifferent to the misconduct of its police officers, he has waived this claim by failing to advance it on appeal. *See Duncan v. Wis. Dep't of Health & Family Serv.,* 166 F.3d 930, 934 (7th Cir. 1999).

We therefore remand this case to the district court with instructions to reinstate Wiley's Fourth Amendment false arrest claim against Officer Jones. The scope of this claim, should Wiley prevail on its merits, is limited to the time from his arrest until he was charged.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY

Plaintiff-Appellant,

v.

CITY OF CHICAGO, and
BRODERICK JONES,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 02 CV 6076 —**Paul E. Plunkett** *Judge.*

[March 22, 2004]

JUDGMENT — ORAL ARGUMENT

Honorable William J. Bauer, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge

The judgment of the District Court is AFFIRMED in part, REVERSED in part and REMANDED. The above is in accordance with the decision of this court entered on this date. Each party to bear its own costs.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 03-1490

REGINALD WILEY

Plaintiff-Appellant,

v.

CITY OF CHICAGO, and
BRODERICK JONES,

Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois
No. 02 CV 6076 —**Paul E. Plunkett** *Judge.*

[April 16, 2004]

ORDER

Honorable William J. Bauer, Circuit Judge
Honorable Daniel A. Manion, Circuit Judge
Honorable Ilana D. Rovner, Circuit Judge

On consideration of the Petition for Rehearing En Banc filed by plaintiff-appellant, in the above-captioned case by plaintiff-appellant, no judge in active service has requested a vote on the Petition for Rehearing En Banc, and all of the judges on the original panel have voted to deny rehearing. The petition is therefore DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CV 6076

REGINALD 1ILEY

Plaintiff,

CITY OF CHICAGO and
CHICAGO POLICE OFFICER
BRODERICK JONES

Defendants.

MEMORANDUM OPINION AND ORDER

PLUNKETT, United States District Judge.

Reginald Wiley has sued the City of Chicago and Broderick Jones under both state and federal law for having wrongfully prosecuted him. The City of Chicago has filed a Federal Rule of Civil Procedure ("Rule") 12(b)(6) motion to dismiss the 42 U. S.C. ' ("section") 1983 claim asserted against it. For the reasons set forth below, the motion is granted.

I. Facts

On January 9, 2000, defendant Jones, who is a Chicago police officer, arrested plaintiff and caused him to be charged with a crime. (Compl. par. 5.) Jones fabricated the evidence on which the arrest was based, but concealed that fact from the prosecutors. (Id. pars. 5-6.) On July 8, 2002, all charges against plaintiff were dismissed. (Id. 17.)

Jones was able to engage in this wrongful conduct because of the City's deliberate indifference to the fabrication of evidence by its police officers. (Id. par. 8.) Plaintiff says that the City's conduct violated his Fourteenth Amendment due process rights and seeks damages in excess of

$100,000.00.

II. The Legal Standard

On a Rule 12(b)(6) motion to dismiss, the Court accepts as true all well-pleaded factual allegations of the complaint, drawing all reasonable inferences in plaintiff's favor. Forseth v. Village of Sussex, 199 F.3d 363, 368 (7th Cir. 2000). No claim will be dismissed unless "it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations." *Hishon v.King & Spalding*, 467 U.S. 69, 73 (1984).

III. Discussion

Federal Claims

Section 1983 provides redress for constitutional deprivations that occur at the hands of certain government actors. 42 U.S.C. §1983. To state a viable section 1983 claim against the City, plaintiff must allege that he was deprived of a constitutional right pursuant to one of the City's customs or policies. *Id.*; *Monell v. New York City Dep't of Soc. Servs.*, 436 U.S. 658, 694 (1978).

The City does not contest plaintiff's "policy" allegations, but says that he has not adequately alleged that he was deprived of a constitutional right. At base, the City says, plaintiff alleges that he was prosecuted without probable cause, conduct that the Seventh Circuit has said is not actionable under section 1983. *See Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir. 2001) (stating that the "effective holding" of Albright v. Oliver, 510 U.S. 266 (1994) is that prosecution without probable cause violates due process if it deprives the plaintiff of "an adequate opportunity to defend himself in [a] criminal prosecution," but is actionable under section 1983 only if state post-deprivation remedies are inadequate); *see also Penn v. Harris*, 296 F.3d 573, 576 (7th Cir. 2002) (quoting *Newsome* for the proposition that "there is no constitutional right not to be prosecuted without probable cause.") (internal quotation marks and citation omitted).

Though malicious prosecution itself is not actionable under section 1983, the conduct underlying that label — suppression of exculpatory evidence, subornation of perjury and the like — is actionable if it violates a substantive constitutional right, like the due process right to a fair trial. *Penn*, 296 F.3d at 576; *Newsome*, 256 F.3d at 752. Plaintiff contends that his allegations state a claim for violation of his fair trial rights, even though he was never actually tried.

The Court disagrees. Nearly thirty years ago, the Seventh Circuit said that the due process clause does not "provide broad generalized protection against misdeeds by police or prosecution." *Christman v. Hanrahan*, 500 F.2d 65, 67 (7thh Cir. 1974). Rather, the court said, "the mission of the clause [is] avoidance of an unfair trial to the accused, and no violation ... result[s] unless the misconduct [has] some prejudicial impact on the defense." Id. Thus, the court held that the due process clause was not violated by the prosecution's unsuccessful attempt to conceal exculpatory evidence because the delay in disclosure, though reprehensible, "did not prejudice the defense." Id. at 68.

Our court of appeals reaffirmed this view of due process in *Hensley v. Carey*, 818 F.2d 646 (7thh Cir. 1987). The plaintiff in that case had been arrested on a variety of criminal charges, largely on the strength of the victim's line-up identification. The charges were later dropped when the victim recanted the identification. Plaintiff filed a section 1983 action against the police officers who ran the line-up, claiming that it was unduly suggestive and, as a result, violated his due process rights.

The Seventh Circuit rejected plaintiff's argument that an improper line-up, by itself, violates due process:

> [The Supreme Court cases] establish a rule which bars the admission of unreliable evidence at trial. The rule against admission of evidence from unnecessarily suggestive lineups is a prophylactic rule designed to protect

> a core right, that is the right to a fair trial, and it is only the violation of the core right and not the prophylactic rule that should be actionable under §1983.

Id. at 649. Even if the line-up were suggestive, the court said, the identification evidence did not deprive him of his right to a fair trial because he was never tried. *Id.* at 649. Thus, the court concluded, plaintiff did not have a viable section 1983 claim. Id.

Plaintiff does not allege that he was tried for the charges on which he was arrested. In fact, in his response to the City's motion, he admits that the "charges were dismissed before trial." (Pl.'s Mem. Opp'n Mot. Dismiss at 3.) That admission dooms his section 1983 fair trial due process claims against both the City and, though he did not file a motion to dismiss, defendant Jones.

The Seventh Circuit's opinion in *Whitley v. Siebel,* 613 F.2d 682 (7th Cir. 1980) does not dictate a different result. *Whitley* is a section 1983 false arrest case that was analyzed under the rubric of due process. *Id.* at 684. In the *Whitley* court's view, a police officer who procured arrest authority through deliberate misrepresentations violated the plaintiff's right not to be seized without due process of law. *Id.* at 686. The case says nothing, however, about whether such conduct violated his due process right to a fair trial.

Plaintiffs reliance on *Jones v. City of Chicago,* 856 F.2d 985 (7thh Cir. 1988) is similarly misplaced. In that case, a young man who had been wrongfully arrested and jailed, but was never tried, sued the City and various police officers under section 1983 for false arrest, false imprisonment and malicious prosecution. In the course of its opinion, the court said:

> [A]t some point after a person is arrested, the question whether his continued confinement or prosecution is unconstitutional passes over from the Fourth

> Amendment to the due process clause.... But the causal inquiry is unchanged. If police officers have been instrumental in the plaintiff's continued confinement or prosecution, they cannot escape liability by pointing to the decisions of prosecutors . . . to confine or prosecute him.

Id. at 994. That statement suggests that police misconduct that occurs after an arrest and results in continued wrongful confinement, i.e., malicious prosecution, can form the basis of a section 1983 due process claim, even if the victim's fair trial rights are not impaired.

But that reading of *Jones* cannot survive *Newsome,* which holds that malicious prosecution, to the extent it violates due process at all, is not actionable under section 1983. *Newsome,* 256 F.3d at 750-52. After *Newsome,* a person who is wrongfully arrested can file a section 1983 Fourth Amendment claim contesting his arrest and the resulting confinement, and one whose fair trial rights are violated by police misconduct after the arrest can file a section 1983 Fourteenth Amendment claim. *Id.* at 751-52. But someone who is unlawfully arrested, does not file a timely Fourth Amendment claim and is never tried, cannot contest his pre-trial detention on the theory that the police officers' failure to tell the prosecutor about their misconduct deprived him of liberty without due process of law. *Id.* at 750-51. That is precisely what plaintiff is attempting to do here, an effort that cannot succeed in this circuit. Plaintiff's section 1983 due process claims, therefore, must be dismissed.

State Claims

Having dismissed the only federal claims in this lawsuit, the Court declines to exercise its supplemental jurisdiction over plaintiff's state-law claims. See 28 U.S.C. §1367(c)(3) (stating that court may decline to exercise supplemental jurisdiction over state claims if it has "dismissed all claims over which it [had] original jurisdiction").

VI. Conclusion

For the reasons set forth above, the City's Rule 12(b)(6) motion to dismiss is granted and the section 1983 fair trial due process claims plaintiff asserts against both defendants are dismissed with prejudice. The Court declines to exercise its supplemental jurisdiction over plaintiffs' state-law claims, which are dismissed without prejudice to refiling in state court. This is a final and appealable order.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CV 6076

REGINALD 1ILEY

Plaintiff,

CITY OF CHICAGO and
CHICAGO POLICE OFFICER
BRODERICK JONES

Defendants.

ORDER ON MOTION TO RECONSIDER

PLUNKETT, United States District Judge.

On January 27, 2003, the Court entered judgment in favor of defendants on plaintiff's complaint. Plaintiff has filed a timely Federal Rule of Civil Procedure 59(e) motion to alter or amend seeking reinstatement of the section 1983 false arrest claim he asserted against defendant Jones.

Plaintiff alleges that Jones arrested him on January 9, 2000. (Compl. par. 5.) But he did not file his complaint until August 26, 2002, well after the two-year limitations period applicable to his false arrest claim had expired. *Kalimari v. Illinois Dept of Corr.*, 879 F.2d 276, 277 (7th Cir. 1989) (stating that statute of limitations for section 1983 actions filed in Illinois is two years).

Plaintiff acknowledges that he was arrested more than two years before he filed suit, but contends that his claim is still timely. Because the premise of his false arrest claim is that Jones fabricated evidence against him, plaintiff says that success on that claim would necessarily have undermined the criminal case against him. As such, he says, *Heck v.*

Humphrey, 512 U.S. 477 (1994) precluded him from filing suit until the criminal case was resolved in his favor. The criminal charges against him were dismissed on July 8, 2002 (See Compl. par. 7), about a month before he filed his complaint. Thus, plaintiff says, his false arrest claim is timely.

Plaintiff's argument was squarely rejected by the Seventh Circuit in *Snodderly v. R.U.F.F. Drug Enforcement Task Force,* 239 F.3d 892 (7th Cir. 2001). Snodderly, like the plaintiff in this case, filed a false arrest claim more than two years after he was arrested, but within two years after the criminal charges against him were dismissed. The district court dismissed the claim as untimely and Snodderly appealed. On appeal, Snodderly argued that *Heck* precluded him from bringing his false arrest claim until the charges against him were dropped because success on that claim would necessarily have impugned the pending prosecution.

The Seventh Circuit disagreed:

> [A] claim for false arrest, insofar as it seeks damages for the arrest only, would not necessarily imply the invalidity of any future conviction or sentence. A plaintiff could succeed on a false arrest claim by demonstrating that he was arrested without probable cause (for example, by showing that the arresting officers ignored exculpatory information and arrested him with little or no basis for suspecting that he committed the crime); however, this would not demonstrate the invalidity of a future conviction for the same offense. A person can be validly convicted regardless of the quantum of evidence possessed by the police at the time of arrest.

Id. at 899. On the strength of that distinction, the court rejected the notion that the accrual date for a section 1983 false arrest claim depends on the facts of each case and the parameters of *Heck.* Instead, the court reaffirmed its position that a claim for false arrest accrues at the time of the arrest. Id.

The court's opinion in *Okoro v. Bohman,* 164 F.3d 1059 (7th Cir. 1999) does not dictate a different result. First, *Okoro,* was not a section 1983 false arrest case, but a case pursuant to federal Rule of Criminal Procedure 41(c) seeking the return of property allegedly stolen during a. search. Id. at 1061. Moreover, even if it were a false arrest case, the court's statement about the application of *Heck* would be dictum because, as the court said, the issue was not even raised by the parties. Id. Finally, *Okoro* was decided two years before the court reaffirmed its "categorical approach" to applying Heck to false arrest cases in *Snodderly.* Thus, *Okoro* would not control this suit even if it were a false arrest case decided on the basis of Heck.

For all of these reasons, plaintiff's motion to alter or amend the Court's January 27, 2003 judgment order is denied.

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 02 CV 6076

REGINALD 1ILEY

Plaintiff,

CITY OF CHICAGO and
CHICAGO POLICE OFFICER
BRODERICK JONES

Defendants.

COMPLAINT

Plaintiff, by counsel, allege as follows:

1. This is a civil action arising under 42 U.S.C. §1983. The jurisdiction of this court is conferred by 28 U.S.C. §1343.

2. Plaintiff Reginald Wiley is a resident of the Northern District of Illinois.

3. Defendant CITY OF CHICAGO is an Illinois municipal corporation.

4. Defendant BRODERICK JONES, #17432 was at all times relevant acting under color of his authority as a Chicago police officers.

5. On January 9, 2000, defendant JONES arrested plaintiff and caused plaintiff to be charged with a criminal offense. Defendant JONES fabricated the evidence on which he made this arrest and did not have a lawful basis on which to make this arrest.

6. Thereafter, defendant JONES concealed defendant's innocence of any criminal wrongdoing from the

prosecutors and thereby caused plaintiff to be wrongfully prosecuted.

7. All charges against plaintiff were dismissed on July 8, 2002.

8. Defendant JONES committed the misconduct referred to above as the result of the deliberate indifference of defendant City of Chicago to the fabrication of evidence by its police officers.

9. As the direct and proximate result of the above described acts, plaintiff was deprived of rights secured by the Fourth and Fourteenth Amendment to the Constitution of the United States and subjected to the Illinois tort of malicious prosecution.

10. Plaintiff hereby demands trial by jury.

Wherefore plaintiff requests that judgment be entered in his favor and against defendants in an amount in excess of one hundred thousand dollars as compensatory damages and against defendants JONES in the amount of one hundred thousand dollars as punitive damages.

/s/ Kenneth N. Flaxman

KENNETH N. FLAXMAN
122 South Michigan Avenue
Suite 1850
Chicago, Illinois 60603
(312) 427-3200
attorney for plaintiff

No. 03-1687

IN THE

Supreme Court of the United States

REGINALD WILEY,

Petitioner,

v.

CITY OF CHICAGO and BRODERICK JONES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

MARA S. GEORGES
Corporation Counsel
of the City of Chicago

LAWRENCE ROSENTHAL *
Deputy Corporation Counsel

BENNA RUTH SOLOMON
Chief Assistant Corporation Counsel

MEERA WERTH
Assistant Corporation Counsel
City Hall, Room 600
Chicago, Illinois 60602
(312) 744-5337

* Counsel of Record

Attorneys for Respondents

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether a plaintiff can recover damages arising from a criminal prosecution in a civil action when he denies that his action is brought on a theory of malicious prosecution.

2. Whether a plaintiff who fails to press a claim against a municipality on appeal has waived that claim for purposes of appellate review.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iv
STATEMENT	1
ARGUMENT	3
CONCLUSION	13

TABLE OF AUTHORITIES

CASES Page

Albright v. Oliver, 510 U.S. 266 (1994) ..... *passim*
Booker v. Ward, 94 F.3d 1052 (7th Cir. 1996), cert. denied, 519 U.S. 1113 (1997) 3
Brothers v. Klevenhagen, 28 F.3d 452 (5th Cir.), cert. denied, 513 U.S. 1045 (1994) 7
Castellano v. Fragozo, 352 F.3d 939 (5th Cir. 2003) (en banc), petitions for cert. filed, 72 U.S.L.W. 3580 (U.S. March 2, 2004) (No. 03-1269) & 72 U.S.L.W. 3659 (U.S. April 8, 2004) (No. 03-1417) 6, 9
Christman v. Hanrahan, 500 F.2d 65 (7th Cir.), cert. denied, 418 U.S. 1050 (1974) 8
Cottrell v. Caldwell, 85 F.3d 1480 (11th Cir. 1996) 7
Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001) ... 7
Galbraith v. County of Santa Clara, 307 F.3d 1119 (9th Cir. 2002) 5, 6
Gallo v. City of Philadelphia, 161 F.3d 217 (3d Cir. 1998) 5, 6
Gauger v. Hendle, 349 F.3d 354 (7th Cir. 2003)... 11
Gerstein v. Pugh, 420 U.S. 103 (1975) 11
Heck v. Humphrey, 512 U.S. 477 (1994).....2, 5, 10, 12
Jones v. Cannon, 174 F.3d 1271 (11th Cir. 1999) .. 12
Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) 11
Kalina v. Fletcher, 522 U.S. 118 (1997) 12
Kingsland v. City of Miami, 369 F.3d 1210 (11th Cir. 2004) 5, 6
Lambert v. Williams, 223 F.3d 257 (4th Cir. 2000), cert. denied, 531 U.S. 1130 (2001) 5
Malley v. Briggs, 475 U.S. 335 (1986) 12
Martinez v. California, 444 U.S. 277 (1980)..... 10

TABLE OF AUTHORITIES—Continued

	Page
McCune v. City of Grand Rapids, 842 F.2d 903 (6th Cir. 1988)	8
Moran v. Clarke, 296 F.3d 638 (8th Cir. 2002)	9
Morgan v. Gertz, 166 F.3d 1307 (10th Cir. 1999)	8
Murphy v. Lynn, 118 F.3d 938 (2d Cir. 1997), cert. denied, 522 U.S. 1115 (1998)	6
Newsome v. McCabe, 256 F.3d 747 (7th Cir.), supplemented on denial of rehearing, 260 F.3d 824 (2001) (per curiam)	9
Nieves v. McSweeney, 241 F.3d 46 (1st Cir. 2001)	5, 7
People v. Woolums, 379 N.E.2d 1385 (Ill. App. Ct. 1978)	11
Phelps v. Coy, 286 F.3d 295 (6th Cir. 2002), cert. denied, 537 U.S. 1104 (2003)	7
Pierce v. Gilchrist, 359 F.3d 1279 (10th Cir. 2004)	5, 9
Riley v. Dorton, 115 F.3d 1159 (4th Cir.) (en banc), cert. denied, 522 U.S. 1030 (1997)	7
Rogala v. District of Columbia, 161 F.3d 44 (D.C. Cir. 1998) (per curiam)	8
Snodderly v. R.U.F.F. Drug Enforcement Task Force, 239 F.3d 892 (7th Cir. 2001)	10
Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997)	9, 10
Taylor v. Waters, 81 F.3d 429 (4th Cir. 1996)	8
United States v. Lanier, 520 U.S. 259 (1997)	8
White v. Moulder, 30 F.3d 80 (8th Cir. 1994), cert. denied, 513 U.S. 1084 (1995)	8
Wiley v. City of Chicago, 361 F.3d 944 (7th Cir. 2004)	8
Zahrey v. Coffey, 221 F.3d 342 (2d Cir. 2000)	9

TABLE OF AUTHORITIES—Continued

STATUTES

Page

42 U.S.C. § 1983 (2000) 1
55 ILCS 5/3-9005(a)(1) (2002) 11

IN THE

Supreme Court of the United States

No. 03-1687

REGINALD WILEY,

Petitioner,

v.

CITY OF CHICAGO and BRODERICK JONES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

On August 26, 2002, petitioner Reginald Wiley filed suit against respondents, Officer Broderick Jones and the City of Chicago, alleging a deprivation of his rights under federal law and seeking redress under 42 U.S.C. § 1983 (2000). R. 1. The complaint alleged that on January 9, 2000, Officer Jones planted drugs on petitioner and then arrested him on false charges. *Id.* The complaint also alleged that petitioner was required to appear repeatedly in court to answer the charges against him until they were dropped on July 8, 2002. *Id.* The complaint sought relief for an allegedly false arrest under the Fourth Amendment and for a deprivation of liberty without

due process of law in violation of the Due Process Clause of the Fourteenth Amendment. *Id.*[1]

The district court dismissed the action. The court concluded that petitioner could advance no due process claim because he was never tried on the charges against him and accordingly was not denied his due process right to a fair trial. Pet. App. 11-13. The district court also concluded that petitioner had failed to bring his Fourth Amendment false arrest claim in a timely fashion. Pet. App. 13. Petitioner sought reconsideration on only his Fourth Amendment claim. R. 18. The district court denied that motion, reasoning that a Fourth Amendment claim accrues when an allegedly unconstitutional search or seizure occurs, and not when criminal proceedings arising from that search or seizure are subsequently concluded. Pet. App. 16. The court accordingly ruled that because petitioner had failed to file suit within the applicable two-year limitations period following his arrest, his Fourth Amendment claim was untimely. Pet. App. 15, 17.

The court of appeals reversed the judgment in favor of Officer Jones, concluding that the district court had erred by ruling that petitioner's Fourth Amendment claim was untimely. Pet. App. 4-5. The court of appeals observed that in *Heck v. Humphrey*, 512 U.S. 477 (1994), this Court had held that a section 1983 suit was premature if its success would "necessarily imply the invalidity of a conviction or sentence," and that the Seventh Circuit had previously held that the rule of *Heck* "applies not only to convicted persons but also to plaintiffs like [petitioner] who has yet only faced prosecution." Pet. App. 3. The court acknowledged that some wrongful arrest claims accrue immediately under *Heck*,

---

[1] The complaint also sought relief under state law for the tort of malicious prosecution. R. 1 ¶ 9. The district court declined to exercise supplemental jurisdiction over the state-law claim. Pet. App. 13.

since "one can have a successful wrongful arrest claim and still have a perfectly valid conviction." Pet. App. 3 (quoting *Booker v. Ward*, 94 F.3d 1052, 1056 (7th Cir. 1996), cert. denied, 519 U.S. 1113 (1997)). Nevertheless, in this case, the court held that "[i]f, as alleged, [petitioner] was arrested and prosecuted solely on the basis of drugs planted by the arresting officers, then any attack on the arrest would necessarily challenge the legality of the prosecution premised on the planted drugs." Pet. App. 4. The court held that petitioner's Fourth Amendment claim did not accrue until the criminal charges against him were dropped and therefore the claim was timely. Pet. App. 4-5. The court added, however, that damages were available under the Fourth Amendment only for the period of time between petitioner's arrest and the filing of charges against him, at which point the applicability of the Fourth Amendment was at an end. Pet. App. 5-6. The court affirmed the judgment in favor of the City of Chicago, holding that petitioner had abandoned his claim against the City by failing to advance it on appeal. Pet. App. 6.

ARGUMENT

Petitioner complains that the court of appeals improperly confined his damages to the period of time between his arrest and the filing of charges, asserting that other circuits have reached inconsistent results with the holding below. Upon examination, however, the asserted conflict between the holding below and the law in other circuits disappears. Moreover, petitioner has waived any challenge to the Seventh Circuit's holding that an arresting officer is ordinarily responsible only for damages up to the point at which the arrestee is charged with a crime. In any event, that holding is consistent with this Court's precedents as well as the realities of the criminal justice system. Finally, while petitioner complains about the court of appeals' ruling that he abandoned his claim against the City of Chicago, his failure to press that claim on appeal properly resulted in its waiver.

In *Albright v. Oliver*, 510 U.S. 266 (1994), this Court considered whether police officers can be held liable under section 1983 for damages arising from a prosecution undertaken at their urging. The Court rejected the plaintiff's argument that the Due Process Clause forbids unwarranted prosecutions; a majority of the Court concluded that the Fourth Amendment's prohibition on unreasonable seizures, and not the Due Process Clause, addresses "deprivations of liberty that go hand in hand with criminal prosecutions." *Id.* at 274 (plurality opinion). Accord *id.* at 290-91 (Souter, J., concurring in the judgment). The four-Justice plurality explained that the Constitution's "Framers considered the matter of pretrial deprivations of liberty and drafted the Fourth Amendment to address it." *Id.* at 274. Accordingly, the plurality concluded that the Fourth Amendment governs "the deprivations of liberty that go hand in hand with criminal prosecutions." *Ibid.* In his separate opinion, Justice Souter rejected Albright's due process theory by noting that none of the injuries described in his complaint "is alleged to have followed from the issuance of the formal instrument of prosecution, as distinct from the ensuing assertion of custody. Thus, [Albright] has not shown a substantial deprivation of liberty from the mere initiation of prosecution." *Id.* at 289.

In this case, the Seventh Circuit held that petitioner can advance a false arrest claim that accrued upon the termination of criminal proceedings against him, but that his damages on that claim are limited to the deprivation of liberty that occurred between his arrest and the filing of charges. See Pet. App. 5-6. Petitioner claims that other circuits have permitted section 1983 plaintiffs to recover damages associated with the prosecution of criminal charges following an arrest against arresting officers under either the Fourth Amendment or the Due Process Clause of the Fourteenth Amendment. See Pet. 4-5 & n.3. In fact, none of the decisions on which petitioner relies stands in conflict with the decision of the Seventh Circuit in this case.

1. Most of the cases that petitioner cites in support of his claim that the Fourth Amendment permits recovery of the damages he seeks were brought on a theory of malicious prosecution. See *Kingsland v. City of Miami*, 369 F.3d 1210, 1222-23 (11th Cir. 2004); *Galbraith v. County of Santa Clara*, 307 F.3d 1119, 1126-27 (9th Cir. 2002); *Nieves v. McSweeney*, 241 F.3d 46, 53-54 (1st Cir. 2001); *Lambert v. Williams*, 223 F.3d 257, 260 (4th Cir. 2000), cert. denied, 531 U.S. 1130 (2001); *Gallo v. City of Philadelphia*, 161 F.3d 217, 221-22 (3d Cir. 1998).[2] The damages available for malicious prosecution, however, differ from the damages available for false arrest. In *Heck*, the Court explained that a section 1983 action seeking damages for the plaintiff's confinement pursuant to legal process is properly characterized as an action for malicious prosecution:

> The common-law cause of action for malicious prosecution provides the closest analogy to claims of the type considered here because, unlike the related action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process. If there is a false arrest claim, damages for that claim cover the time of detention up to the issuance of process, but no more. But a successful malicious prosecution plaintiff may recover, in addition to general damages, compensation for any arrest or imprisonment, including damages for discomfort or injury to his health, or loss of time and deprivation of society.

512 U.S. at 484 (internal quotations and citations omitted). Petitioner, however, has abandoned any theory of malicious prosecution. As the court of appeals observed, "at oral

---

[2] Petitioner also cites *Pierce v. Gilchrist*, 359 F.3d 1279 (10th Cir. 2004), in support of his Fourth Amendment claim, but in that case the court declined to decide what damages were available under the Fourth Amendment since it found that the plaintiff had also advanced an appropriate due process theory. See *id.* at 1286.

argument [petitioner]'s counsel insisted that his case was not one for malicious prosecution." Pet. App. 6. Thus, decisions recognizing a Fourth Amendment theory of malicious prosecution stand in no tension with this case, in which no such theory is presented. Accordingly, while there is unquestionably conflict in the circuits over the standards applicable to a section 1983 action for malicious prosecution, see, *e.g.*, *Castellano v. Fragozo*, 352 F.3d 939, 949-53 (5th Cir. 2003) (en banc), petitions for cert. filed, 72 U.S.L.W. 3580 (U.S. March 2, 2004) (No. 03-1269) & 72 U.S.L.W. 3659 (U.S. April 8, 2004) (No. 03-1417), that conflict is irrelevant here because petitioner has abandoned a theory of malicious prosecution.

As petitioner notes (Pet. 5), in *Albright*, Justice Ginsburg expressed the view that an individual facing criminal charges is subject to a "continuing seizure" as long as the prosecution lasts and accordingly a Fourth Amendment claim does not accrue until the prosecution ends. See 510 U.S. at 277-80 (concurring opinion). Two other Members of the Court expressed agreement with this view. See *id.* at 307 (Stevens, J., joined by Blackmun, J., dissenting). Since then, three circuits have embraced Justice Ginsburg's view, at least when the plaintiff relies on a theory of malicious prosecution. See *Kingsland*, 369 F.3d at 1222; *Gallo*, 161 F.3d at 222-24; *Murphy v. Lynn*, 118 F.3d 938, 945-46 (2d Cir. 1997), cert. denied, 522 U.S. 1115 (1998).[3] Petitioner, however, disclaims reliance on a theory of malicious prosecution, as we note above. Moreover, before *Albright*, a number of circuits

---

[3] Petitioner is wrong, however, to claim that the Fourth, Fifth, and Ninth Circuits have embraced this view. In *Castellano*, the Fifth Circuit declined to rest its decision on Justice Ginsburg's concept of a continuing seizure: "This view did not attract majority support in *Albright* and we need not here further define its limits." 352 F.3d at 959. In *Galbraith* and *Lambert*, there was no discussion of the concept of a continuing seizure. See *Galbraith*, 307 F.3d at 1126-27; *Lambert*, 223 F.3d at 261-62.

had rejected the concept of a "continuing seizure" that lasts until criminal proceedings have concluded (see 510 U.S. at 312 n.30 (Stevens, J., dissenting)), and at least five circuits have rejected that view since then. See Pet. App. 5-6; *Nieves*, 241 F.3d at 55-57; *Riley v. Dorton*, 115 F.3d 1159, 1162-64 (4th Cir.) (en banc), cert. denied, 522 U.S. 1030 (1997); *Cottrell v. Caldwell*, 85 F.3d 1480, 1490 (11th Cir. 1996); *Brothers v. Klevenhagen*, 28 F.3d 452, 456-57 (5th Cir.), cert. denied, 513 U.S. 1045 (1994).[4]

In any event, should the Court wish to grant plenary review to consider the "continuing seizure" theory petitioner urges, and on which there admittedly is a conflict in the circuits, it is more properly presented by the petition for certiorari that Officer Jones has filed seeking review of the Seventh Circuit's holding on the accrual issue in this case (No. 03-1717). While the first two questions in the petition here may relate to that issue, the first question in this petition is confusing, and both questions raise other issues as well. Moreover, Justice Ginsburg's opinion in *Albright* framed the issue presented by the theory of "continuing seizure" in terms of when a Fourth Amendment claim accrues, and that question is squarely presented by the petition filed by Officer Jones, but is at best indirectly raised in the questions presented in this petition. Moreover, as we explain above and again below, this petition is plagued by waiver problems, and accordingly is not a good candidate for plenary review.

2. In the decision below, the Seventh Circuit did not comment on petitioner's due process theory, presumably

---

[4] There is also a conflict in the circuits on the related question whether a "seizure" for purposes of the Fourth Amendment encompasses only the initial deprivation of liberty by the authorities or continues as long as an arrestee remains in the custody of the arresting officers. See, *e.g.*, *Phelps v. Coy*, 286 F.3d 295, 300 (6th Cir. 2002), cert. denied, 537 U.S. 1104 (2003); *Fontana v. Haskin*, 262 F.3d 871, 879-80 & n.5 (9th Cir. 2001).

because petitioner abandoned it in his reply brief. In that brief, after briefly discussing a potential theory of due process liability, petitioner wrote:

> In this case, however, there is no need to consider any due process claim because "if a constitutional claim is covered by a specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." A police frame-up deprives the criminal defendant of the post-warrantless arrest judicial determination of probable cause . . . and is actionable as a Fourth Amendment violation.

Reply Brief of Plaintiff-Appellant at 5, *Wiley v. City of Chicago*, 361 F.3d 994 (7th Cir. 2004) (No. 03-1490) (citation omitted) (quoting *United States v. Lanier*, 520 U.S. 259, 272 n. 7 (1997)) [hereafter cited as "CA7 Reply Br."]. Thus, petitioner expressly waived his due process theory below.

Waiver aside, while Officer Jones's allegedly baseless arrest was unquestionably a Fourth Amendment violation, it did not also violate the Due Process Clause. In the Seventh Circuit, it has been settled since then-Judge Stevens's opinion in *Christman v. Hanrahan*, 500 F.2d 65 (7th Cir.), cert. denied, 418 U.S. 1050 (1974), that a section 1983 plaintiff cannot complain that he was deprived of due process of law based on the prosecution of unwarranted criminal charges when the prosecution did not result in a conviction. See Pet. App. 11-12. At least five circuits have adopted this same rule. See *Morgan v. Gertz*, 166 F.3d 1307, 1310 (10th Cir. 1999); *Rogala v. District of Columbia*, 161 F.3d 44, 55-56 (D.C. Cir. 1998) (per curiam); *Taylor v. Waters*, 81 F.3d 429, 435-36 (4th Cir. 1996); *White v. Moulder*, 30 F.3d 80, 82-83 (8th Cir. 1994), cert. denied, 513 U.S. 1084 (1995); *McCune v. City of Grand Rapids*, 842 F.2d 903, 907 (6th Cir. 1988). This view does not leave petitioner without a remedy,

however, since the availability of damages for a malicious prosecution under Illinois tort law provides all the process that is due. See, *e.g.*, *Newsome v. McCabe*, 256 F.3d 747, 750-51 (7th Cir.), supplemented on denial of rehearing, 260 F.3d 824 (2001) (per curiam). See also *Albright*, 510 U.S. at 284-86 (Kennedy, J., concurring in the judgment).

While petitioner asserts that several circuits have adopted a contrary rule (Pet. 5), that claim does not withstand scrutiny. Two of the cases he cites involve section 1983 plaintiffs who had been convicted. See *Pierce v. Gilchrist*, 359 F.3d 1279, 1282-83 (10th Cir. 2004); *Castellano*, 352 F.3d at 943. Accordingly, these decisions are consistent with the law in the Seventh Circuit, which recognizes due process liability in such cases. See, *e.g.*, *Newsome*, 256 F.3d at 751-53. In two other cases, the plaintiff had alleged some additional injury separate from his arrest that would support a due process claim under the view expressed by Justice Souter in *Albright*. See *Moran v. Clarke*, 296 F.3d 638, 645-48 (8th Cir. 2002) (police officer was suspended, demoted, and stigmatized by false evidence and defamatory accusations); *Zahrey v. Coffey*, 221 F.3d 342, 344-46, 350-52 (2d Cir. 2000) (prosecutor and investigating officers conspired to fabricate evidence during the course of a lengthy investigation leading to an indictment). Petitioner, however, has never claimed that he suffered any injury in this case distinct from the deprivation of liberty occasioned by his arrest; nor has he placed any reliance on Justice Souter's view of due process expressed in *Albright*. Moreover, petitioner has repudiated any theory of malicious prosecution, as we explain above. The final due process case petitioner cites, *Stemler v. City of Florence*, 126 F.3d 856 (6th Cir. 1997), is completely inapposite. In that case, the court held only that an allegation of fabricating evidence was not barred by the preclusive effect of a state court's finding of probable cause to arrest in the underlying criminal case against the plaintiff. See *id.* at 871-72. In

Stemler, the court simply did not consider whether the plaintiff had advanced a proper due process claim under *Albright*.

3. Petitioner complains that the limitation on the damages recoverable on a Fourth Amendment false arrest claim recognized in the decision below is inconsistent with the rule that section 1983 defendants are properly held liable for all the natural consequences of their acts. See Pet. 6-7. But petitioner waived this argument below by expressly conceding that the damages attributable to a false arrest are cut off once the arrest results in legal proceedings:

> Damages for a false arrest end where there has been a judicial determination of probable cause: "A claimant pleading false arrest can pursue damages only for the detention that occurred 'up to issuance of process or arraignment, but not more.'" *Snodderly v. R.U.F.F. Drug Enforcement Task Force*, 239 F.3d 892, 900 n.9 (7th Cir. 2001), quoting *Heck v. Humphrey*, 512 U.S. 477, 484 (1994).

CA7 Reply Br. at 2. Petitioner can hardly fault the court of appeals for adopting his own position on the available damages for a false arrest claim.

In any event, the court of appeals was correct to hold that the damages attributable to an arrest without probable cause end once the arrest leads to legal proceedings controlled by the prosecutor rather than the arresting officer. While section 1983 generally recognizes an officer's liability for any injury traceable to a constitutional violation, it has long been settled that section 1983 liability ends when there is an intervening or superceding cause of the plaintiff's injury. See, *e.g.*, *Martinez v. California*, 444 U.S. 277, 285 (1980). Under this rule, an arresting officer ordinarily is not liable for damages caused by an ensuing prosecution because the prosecutor's decision to go forward with charges based on his own assessment of the strength of the case and the credibility of

the witnesses is properly considered an intervening or superceding cause, at least when there is no allegation that the arresting officer participated in the prosecutorial decision. After all, as Justice Ginsburg has observed, a section 1983 claim against police officers based on an assertedly unconstitutional prosecution "is anomalous," since "[t]he principal player in carrying out the prosecution . . . is not police officer but prosecutor." *Albright*, 510 U.S. at 279 (concurring opinion).[5] There is usually no reason to doubt that prosecutors exercise independent judgment when deciding whether a police officer's account is sufficiently credible to warrant the pursuit of a criminal charge against an accused. Moreover, the Fourth Amendment does not address the process of deciding whether to file charges against an arrestee; it has instead long been settled that "the accused is not 'entitled to judicial oversight or review of the decision to prosecute.'" *Id.* at 274 (plurality opinion) (quoting *Gerstein v. Pugh*, 420 U.S. 103, 118-19 (1975)). Thus, it makes little sense to consider damages flowing from a prosecutor's decision to bring charges as cognizable on a Fourth Amendment claim.

Accordingly, the Seventh Circuit has correctly concluded that police officers are ordinarily not liable on a false arrest claim for damages flowing from an ensuing prosecution even when the plaintiff claims that the arresting officer's account of his conduct was false. See, *e.g.*, Pet. App. 6; *Gauger v. Hendle*, 349 F.3d 354, 362-63 (7th Cir. 2003).[6] The Eleventh

---

[5] Indeed, under Illinois law, it is the State's Attorney, not the police, who undertakes and controls the prosecution of criminal charges. See *People v. Woolums*, 379 N.E.2d 1385, 1390 (Ill. App. Ct. 1978). See also 55 ILCS 5/3-9005(a)(1) (2002).

[6] Even in the Seventh Circuit, however, when a police officer takes steps to prevent the prosecutor from accurately assessing the credibility of witnesses and the strength of a case, damages caused by an ensuing prosecution may be available. See, *e.g.*, *Jones v. City of Chicago*, 856 F.2d 985, 991, 993-95 (7th Cir. 1988).

Circuit has taken the same view. See *Jones v. Cannon*, 174 F.3d 1271, 1287 (11th Cir. 1999). For his part, petitioner does not identify any circuit to have ruled to the contrary.[7] To be sure, this issue is rarely litigated, but that is presumably because of the long-settled rule that a false arrest claim does not reach the arrestee's subsequent confinement pursuant to legal process. As we explain above, this Court made plain in *Heck* that a false arrest claim, unlike an action for malicious prosecution, does not permit recovery of damages caused by the arrestee's conviction or confinement. Petitioner, however, has abandoned a theory of malicious prosecution; his Fourth Amendment claim is only for a false arrest.

4. Petitioner also complains of the Seventh Circuit's holding that he had abandoned his claim against the City of Chicago. See Pet. 7-8. But in neither his principal nor reply brief in the court of appeals did petitioner say a word about his claim against the City of Chicago. For that reason, the court of appeals was entirely warranted in concluding that petitioner had abandoned the claim. In any event, petitioner's claim against the City was more than a little ridiculous. Petitioner claims that the City has a policy of tolerating the fabrication of evidence by its police officers, and the court of appeals could have easily concluded that petitioner did not seriously press such an outlandish accusation. Had petitioner wished to preserve this claim—for whatever it is worth—surely it is not asking too much to expect him to say a word

---

[7] Petitioner relies instead on two of this Court's decisions, neither of which is pertinent. In *Kalina v. Fletcher*, 522 U.S. 118 (1997), the Court held that a prosecutor is not entitled to absolute judicial immunity for sworn statements made in support of applications for arrest warrants. See *id.* at 129-31. In *Malley v. Briggs*, 475 U.S. 335 (1986), the Court held that police officers were not immune for statements made for applications to obtain arrest warrants when the officer had no reasonable basis to believe that there was probable cause to support the warrant. See *id.* at 342-45. In both of these cases, therefore, suit was directed against the person who applied to a judicial officer for a warrant.

or two about it in his appellate briefs. Moreover, this narrow issue, of no significance to anyone but the parties here, does not merit plenary review by this Court.

CONCLUSION

For the preceding reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

MARA S. GEORGES
Corporation Counsel
of the City of Chicago
LAWRENCE ROSENTHAL *
Deputy Corporation Counsel
BENNA RUTH SOLOMON
Chief Assistant Corporation
Counsel
MEERA WERTH
Assistant Corporation Counsel
City Hall, Room 600
Chicago, Illinois 60602
(312) 744-5337

* Counsel of Record

Attorneys for Respondents

July 12, 2004

No. 03-1687

Supreme Court, U.S.
FILED
JUL 23 2004
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

BRODERICK JONES,

Petitioner,

-against-

REGINALD WILEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF THE CITY OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York,
LEONARD J. KOERNER,
LARRY A. SONNENSHEIN,
Counsel of Record
SHARYN ROOTENBERG,
Attorneys for *Amicus Curiae,*
City of New York
100 Church Street, 6th Floor
New York, New York 10007.
(212) 788-1049 or 1067

July 22, 2004

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING THE WRIT 3

I. THE PETITION SHOULD BE GRANTED TO CLARIFY THE IMPACT, IF ANY, OF HECK V. HUMPHREY, 512 U.S. 477 (1994), ON THE ACCRUAL DATE OF FALSE ARREST CLAIMS BROUGHT UNDER 42 U.S.C. §1983 3

II. THE RULE SET FORTH IN HECK V. HUMPHREY, 512 U.S. 477 (1994), DOES NOT APPLY TO SITUATIONS INVOLVING A MERE POSSIBILITY OF FUTURE CONVICTION. 5

CONCLUSION 7

TABLE OF AUTHORITIES

Page

CASES

Brooks v. City of Winston-Salem,
85 F.3d 178 (4th Cir. 1996) 2

Chardon v. Fernandez,
454 U.S. 6, 8 (1981) 3

Covington v. The City of New York,
171 F.3d 117, cert. den., 528 U.S. 946 (1999) 1,7

Delaware State College v. Ricks,
449 U.S. 250, 258 (1980) 3

Heck v. Humphrey,
512 U.S. 477 (1994) ..... passim

Mackey v. Dickson,
47 F.3d 744 (5th Cir. 1995) 2

STATUTES

28 U.S.C. §2254 5

42 U.S.C. §1983 ..... i, 1, 2, 3, 5

The *amicus curiae* City of New York respectfully submits this brief in support of the petition for certiorari.

STATEMENT OF INTEREST

Pursuant to Rule 37(4), this *amicus curiae* brief is presented on behalf of the City of New York.

This case brings to the forefront a critically important issue for the City of New York (the "City"); namely, the point at which a false arrest claim accrues under 42 U.S.C. §1983 for statute of limitation purposes. Ever since this Court's holding in Heck v. Humphrey, 512 U.S. 477 (1994) ("Heck"), circuit courts across the country have issued conflicting interpretations regarding when a Fourth Amendment false arrest claim accrues. Since there are currently approximately 631 false arrest claims pending against the City in federal court, and the City regularly defends hundreds of false arrest claims every year, the issue raised in the underlying case is of fundamental importance to the City and other similarly situated municipalities throughout the country.

Like the Seventh Circuit in the case at bar, the Second Circuit has erroneously applied the Heck holding to cases which will never result in a conviction or judgment, wrongly concluding that the statute of limitations on a false arrest cause of action under §1983 begins to run only after the criminal prosecution has been dismissed or otherwise invalidated or reversed. See Covington v. The City of New York, 171 F.3d 117, cert. den., 528 U.S. 946 (1999). Other circuits, however, have reached earlier accrual dates. This has resulted in a sharp division amongst the circuits in an area where there should be conformity and consistency. Accordingly, these divergent decisions call for the exercise of this Court's plenary review.

SUMMARY OF ARGUMENT

Certiorari should be granted because the Seventh Circuit's holding contravenes the long-respected rule that false arrest claims accrue upon arrest, and directly conflicts with numerous rulings by other Circuit Courts that address Heck but also follow the accepted rule that false arrest claims accrue upon arrest. Those decisions correctly recognize that success on a false arrest claim would not necessarily undermine the validity of a criminal conviction or sentence arising from the same general factual circumstances, in view of the myriad of other sources of evidence that might be used to obtain a conviction in addition to that evidence, if any, seized or otherwise obtained at the time of an arrest. Eg. Brooks v. City of Winston-Salem, 85 F.3d 178 (4th Cir. 1996) (Heck does not alter general rule that §1983 claim seeking damages for unlawful arrest accrues when plaintiff knows of injury); Mackey v. Dickson, 47 F.3d 744, 746 (5th Cir. 1995) ("It is well established that a claim of unlawful arrest, standing alone, does not necessarily implicate the validity of a criminal prosecution following the arrest").

The City maintains that, as a matter of law, a false arrest claim, standing alone, which is asserted in an action brought under 42 U.S.C. §1983, can never be found to inevitably impugn the validity of a conviction or sentence, a finding required in Heck before holding that the accrual of a cause of action does not occur until after favorable disposition of the underlying criminal action.

REASONS FOR GRANTING THE WRIT

I. THE PETITION SHOULD BE GRANTED TO CLARIFY THE IMPACT, IF ANY, OF HECK V. HUMPHREY, 512 U.S. 477 (1994), ON THE ACCRUAL DATE OF FALSE ARREST CLAIMS BROUGHT UNDER 42 U.S.C. §1983.

This case involves a critically important issue in the administration of justice in the federal courts that frequently arises in cases brought under §1983: when a false arrest claim accrues. The threshold determination of accrual is of fundamental importance in deciding whether the claim is timely under the relevant statutes of limitations, which protect against stale claims.

The Seventh Circuit's holding herein is not reconcilable with the essential nature of false arrest claims. It is well recognized that a claim accrues when a person knows that he or she has been wronged. Chardon v. Fernandez, 454 U.S. 6, 8 (1981) (per curiam); Delaware State College v. Ricks, 449 U.S. 250, 258 (1980). The Seventh Circuit's determination that plaintiff's false arrest claim did not accrue until after the dismissal of the criminal prosecution fails to recognize the fact--critical for analysis of the accrual issue--that plaintiff knew that he had been wronged by a false arrest, if indeed he was, at the time of the arrest. No sound reason has been presented why it should not, therefore, be found that his cause of action for false arrest accrued at that time.

In the case of a claim of false arrest, or an arrest without probable cause, all relevant facts are known to or may be discovered by the arrestee, as well as the arrestor, at the time of the arrest. The damages that may be sought cover only the time of detention up until the issuance of process or arraignment. Heck, 512 U.S. at 484. Further, there is no bar to a civil suit based upon a claim of false arrest, although, if advisable, such suit could be stayed

pending determination of the issue of probably cause in the related criminal proceedings, if any were instituted.

In the case of a civil rights claim in the nature of malicious prosecution, in contrast, while the fact of the initiation of an action is known when an indictment or complaint is filed, other critical elements of the cause of action, including a favorable termination, cannot be known until later. Moreover, the full amount of damages that may be recovered, including those for any arrest or imprisonment, discomfort or injury to health, loss of time, deprivation of society or loss of reputation, also cannot be known until the dismissal of the criminal charges. See Heck, 512 U.S. at 484. Prosecution of a civil rights claim in the nature of malicious prosecution is, therefore, neither possible nor practicable until the termination of the underlying proceeding.

This Court held in Heck that the §1983 claim at issue there, in which the criminally convicted plaintiff whose conviction was on appeal, alleged an improper investigation leading to his arrest, destruction of exculpatory evidence and use of an improper voice identification procedure at trial, was closest in nature to a common law claim of malicious prosecution. 512 U.S. at 484. Such action, this Court properly reasoned, "provides the closest analogy...because, unlike the related cause of action for false arrest or imprisonment, it permits damages for confinement imposed pursuant to legal process." Id.

Here, in holding that the plaintiff's Fourth Amendment claim could not accrue until the date criminal charges against him were dropped, the Seventh Circuit improperly failed to distinguish between plaintiff's bare false arrest claim, which had the potential for being litigated without necessarily impacting on or conflicting with his criminal case, and a case in the nature of malicious prosecution. The latter, unlike the former, necessarily attacks the conviction itself, and thus could never be independently

conducted without running a risk of direct conflict in the results achieved in the civil and criminal arenas.

II. THE RULE SET FORTH IN HECK V. HUMPHREY, 512 U.S. 477 (1994), DOES NOT APPLY TO SITUATIONS INVOLVING A MERE POSSIBILITY OF FUTURE CONVICTION.

In the absence of an actual conviction or sentence, it is difficult, at best, to determine definitively whether actions challenged in a §1983 claim would have been material to a conviction. Moreover, most plaintiffs, in the absence of a conviction, would have an unencumbered opportunity to commence an action.

Many circuits, including the Seventh and Second, have utterly failed to address the stunning impracticability of the task to determine whether success of a false arrest claim would necessarily impugn the validity of a related conviction, where the conviction at issue was not only potential rather than actual, but also where it would never ultimately be obtained. In any case where criminal charges have been dismissed prior to trial--not an uncommon scenario--one could never know whether a conviction might not have been obtained based upon evidence that the prosecution acquired independently of the alleged false arrest. Even if constitutionally admissible incriminating evidence still were not available at the time of dismissal of the charges, it might later have been obtained through a myriad of circumstances that could never be predicted with reasonable accuracy. The question whether the validity of a conviction or sentence would necessarily be impugned by success on a false arrest claim thus could never conclusively be answered in a case where the criminal charges had been dismissed without a trial.

This precise dilemma led the Second Circuit, in Covington, to remand the case to the District Court for a factual inquiry into whether success on plaintiff's false

arrest claim would necessarily have impugned the validity of a conviction that might have been obtained, but never will be. The practical difficulties the City now faces in light of that holding are enormous. It places an intolerable burden both on the City as well as the district courts to recreate with some reasonable accuracy the circumstances surrounding a significantly aged arrest and prosecution. It also requires the District Court to speculate in that endeavor, about what evidence the State might have discovered and presented in addition to that recovered upon the arrest.[1] It is virtually impossible to definitively establish whether the success of a false arrest claim would necessarily impugn the validity of a related conviction—particularly where the conviction at issue was not only potential rather than actual, but would never ultimately be obtained. Simply put, the conclusion Judge Glasser reached in his well reasoned dissent in Covington has come

---

[1] Previously, the District Courts in the Second Circuit have followed the rule that a claim under §1983 in the nature of false arrest accrues at the time of the arrest. E.g., Covington v. City of New York, 916 F.Supp. 282, 285-286 (S.D.N.Y. 1996). Following the decision of the Second Circuit, however, one District Court in the Second Circuit recently held that "the only feasible rule, following Covington, is that a false arrest claim accrues at the termination of the prosecution (or at the time of arrest if no prosecution is pursued), even though a favorable termination is not an element of the claim. Any other rule would require the civil plaintiff to predict whether the evidence used to prosecute him will extend beyond that evidence which caused his arrest, in order to determine when his false arrest claim accrues." Pichardo v. New York City Police Dept., 98 Civ. 429 (S.D.N.Y.) (DLC), unreported order, May 10, 1999, vacating the prior dismissal of the false arrest claim as untimely. Pichardo v. New York City Police Dept., 1998 U.S. Dist. LEXIS 18025 (S.D.N.Y. 1998).

to pass. Specifically, holdings such as the one at bar have "place[d] upon the district court an impossible and totally unrealistic burden." Covington v. City of New York, 171 F.3d 117, 128 (2nd Cir. 1999).

In sum, for the reasons set forth herein and within the City of Chicago's Petition for a Writ of Certiorari, this Court should grant the City of Chicago's petition to clarify the application of Heck in cases where no conviction has ever been, or ever will be, obtained. As illustrated by multiplying the 631 false arrest claims pending against the City in federal court this year annually, the sheer burden of implementing Heck is alone reason for the Court to address this issue.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL A. CARDOZO,
Corporation Counsel of the
City of New York

Larry A. Sonnenshein,
Attorney for *Amicus Curiae*.

LEONARD J. KOERNER,
LARRY A. SONNENSHEIN,*
SHARYN ROOTENBERG,
of Counsel.

*Counsel of Record
July 22, 2004